IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX APPLICATION No 411 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE
and
Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question ofJ : NO

JJJJ

ORAL JUDGEMENT

(per A.R. Dave, J.)

Under the provisions of sec. 256(2) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act'), the Commissioner of Income-tax has filed this application with a prayer for directing the Income Tax Appellate Tribunal, Ahmedabad Bench 'C' to raise and refer to this court the following questions of law for its consideration:-

"1. Whether, on the facts and in the circumstances of the case, the ITAT were justified in law in admitting a new plea contrary to the fact on the record that the development expenditure of Rs. 38 lacs paid to Shri Harlalka and Shri Jain is an admissible expenditure contrary to the provision of rule 28 read with rule 10 of the appellate tribunal rules and to base its finding thereon?

2. Whether, on the facts and circumstances of the case, the ITAT having held that only the profit of the undisclosed income has to be taxed in the block assessment was justified in admitting the claim of expenditure on the basis of oral evidences though the department had clearly discharged its onus to prove the undisclosed receipt in the form of on money on the basis of material found and seized during the course of search?"

2. We have heard learned advocate Shri B.B. Naik appearing for the applicant and learned advocate Shri S.N. Soparkar appearing for the respondent assessee.

3. The facts in a nutshell which have given rise to the questions referred to hereinabove are as under:-

4. In a block assessment for a period commencing from 1986-87 to 1995-96 and 1st April 1995 to 6th October 1995, the respondent assessee was in the business of construction and he was found to have earned a sum of Rs. 1.47 crores and therefore the said amount was added in his income for the said period. Being aggrieved by the assessment, the assessee had approached the ITAT, Ahmedabad Bench 'A' by way of an appeal and, ultimately, the Tribunal had allowed the appeal.

5. The case of learned advocate Shri BB Naik appearing for the applicant is that development expenditure of Rs. 38 lacs paid to Shri Harlalka and Shri Jain was treated as an admissible expenditure by the Tribunal though the said expenditure was not allowed by the Assessing Officer as no evidence was adduced by the respondent assessee with regard to the said expenditure. In view of the facts of the case, it has been submitted by learned advocate Shri Naik that the said amount of expenditure ought not to have been allowed by the Tribunal. It has been submitted by him that the Tribunal ought not to have presumed that the assessee must have incurred expenditure referred to hereinabove in absence of evidence adduced by the assessee.

6. In reply to the said submission of learned advocate Shri Naik, it has been submitted by learned advocate Shri Soparkar appearing for the respondent assessee that the entire question pertains to a question of fact and no question of law has been involved in the matter for the reason that the Tribunal had considered some evidence which was produced before the Assessing Officer at the eleventh hour. Though the said evidence was not looked into by the Assessing Officer, the Tribunal had considered the same at the time of deciding the appeal. It has been submitted by learned advocate Shri Soparkar that ascertainment of profit by considering the amount of expenditure would be a question of fact and therefore it would not be just and proper to refer the said question in view of the judgments delivered by the Hon'ble Supreme Court in cases of Aluminium Corporation of India Ltd. v. Commissioner of Income-tax, West Bengal, 86 ITR 11 and CIT, West Bengal-II v. Durga Prasad More, 82 ITR 540.

7. So far as the first question is concerned, after hearing the concerned learned advocates, we are of the view that the said question does not involve any question of law because the Tribunal has duly considered the evidence which was not considered by the Assessing Officer as there was some delay in placing the said material before the assessing officer. It appears that the department had never raised any objection with regard to consideration of the said evidence by the Tribunal at the time when the appeal was heard. Moreover, looking to the ratio of the judgments cited by learned advocate Shri Soparkar, we are of the view that the said question does not involve any question of law and therefore it need not be referred to.

8. So far as question No. 2 is concerned, it has

been submitted by learned advocate Shri Naik appearing for the applicant that the entire undisclosed income ought to have been considered as income for the block assessment period and the Tribunal was not justified in admitting the claim of expenditure on the basis of oral evidence which was referred to at the time of hearing of the appeal.

9. Learned advocate Shri Soparkar appearing for the respondent assessee has raised an objection with regard to referring the second question also for the reason that the said question also involves disputed question of fact.

10. Even so far as the second question is concerned, we are of the view that the said question also does not involve any question of law especially in view of the fact that the Tribunal has rightly considered that in absence of any financial record or accounts being maintained by the respondent assessee, the profit earned by the respondent assessee for the block assessment was presumed to be more than 8% as per the provisions of sec. 44AD of the Act. We do not agree with learned advocate Shri Naik that as no accounts have been maintained or nothing to substantiate the amount of expenditure incurred by the respondent assessee had been shown, the entire amount received by the respondent assessee should be treated as income. We do not think that the Tribunal was not justified in considering the fact that the respondent assessee ought to have spent reasonable amount for the purpose of receiving the gross receipt. If the legal provisions provide that in absence of accounts, the person should be presumed to have earned 8% profit if he is in the business of civil construction, we do not think that the findings of the Tribunal could be treated as perverse. In any case, we do not think it necessary to call for statement of case from the Tribunal for our consideration.

11. In the circumstances, we do not find any substance in the application as no question of law has bee involved and, therefore, this application is rejected with no order as to costs.

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